COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

Petition not printed

No. 398

ROY BUTE,

Petitioner.

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR PETITIONER

VICTOR BRUDNEY,
Attorney for Petitioner.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	2
Specification of Errors to be Urged	6
Summary of Argument	6
Argument	8
I—Due process of law under the Fourteenth Amendment entitled petitioner to the assignment of counsel before his plea to the indictment lodged against him was accepted	9
A. Petitioner was entitled to assignment of counsel if he required legal assistance in order adequately to make his defense to the charges here levelled	9
B. Petitioner required the assistance of counsel in order adequately to make his defense to the accusation here levelled	13
II—Petitioner did not waive the assistance of counsel to which he was entitled	22
Conclusion	38
Appendix	39

CASES CITED

PAGE

Adams v. U. S. ex rel McCann, 317 U. S. 269 ..... 12, 15, 22, 23, 24, 25, 26
Aero Mayflower Transit Co. v. Commissioners, No. 39, Oct. Term, 1947 30
Ashcraft v. Tennessee, 322 U. S. 143 ..... 30, 37

Betts v. Brady, 316 U. S. 455 ..... 9, 11, 15, 21, 22, 30

Canizio v. New York, 327 U. S. 82 ..... 10, 11, 27
Carter v. Illinois, 329 U. S. 173 ..... 9, 11, 12, 21, 23, 27, 28
Cochran v. Kansas, 316 U. S. 255 27

De Meerleer v. Michigan, 329 U. S. 663 ..... 10, 23, 27
D'Elia, Ex parte, 51 F. Supp. 542 26

Fairce v. Amrine, 154 Kans. 618 26
Foster v. Illinois, 332 U. S. 134 ..... 8, 9, 12, 21, 26, 28, 30, 37

Glasser v. United States, 315 U. S. 60 25

Haley v. Ohio, No. 51, Oct. Term, 1947 ..... 36, 37
Harris and May v. State, 203 Ind. 505 27
Hawk, Ex parte, 321 U. S. 114 10
Hawk v. Olson, 326 U. S. 271 ..... 11, 12, 13
Hill v. Hudspeth, 161 Kans. 376 26
Hodges v. Easton, 106 U. S. 408 25
House v. Mayo, 324 U. S. 42 12

Johnson v. Zerbst, 304 U. S. 458 ..... 9, 24, 25, 27

Knox County Council v. State ex rel. McCormick, 217 Ind. 493 27
Krolage v. People, 224 Ill. 456 35

Logan v. Johnston, 28 F. Supp. 98 26
Loundagin, In re Application of, 129 Ore. 652 ..... 27, 35, 36

PAGE

Marino v. Ragen, No. 93, October Term, 1947 ..... 10, 29
Michener v. Johnston, 141 F. (2) 171, 146 F. (2) 129 26
Mooney v. Holohan, 294 U. S. 103 29

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292 ..... 25, 38
O'Shea v. People, 218 Ill. 352 17

Palko v. Connecticut, 302 U. S. 319 ..... 9, 25, 26
Patton v. United States, 281 U. S. 276 ..... 25, 27
People v. Batey, 392 Ill. 390 33
People v. Benner, 224 Ill. App. 515 32
People v. Bernovich, 391 Ill. 141 32
People v. Bernsee, 367 Ill. 518 ..... 14, 15
People v. Braner, 389 Ill. 190 ..... 34, 37
People v. Brown, 397 Ill. 529 ..... 34, 36
People v. Carter, 391 Ill. 594 4
People v. Carter, 398 Ill. 336 33
People v. Childers, 386 Ill. 312 33
People v. Cochran, 313 Ill. 508 ..... 16, 17
People v. Cooper, 366 Ill. 113 32
People v. Corbett, 387 Ill. 41 ..... 33, 34, 37
People v. Corrie, 387 Ill. 587 ..... 32, 33, 34, 35, 37
People v. Cozzie, 397 Ill. 620 16
People v. Crane, 302 Ill. 217 ..... 3, 14, 15, 19
People v. Creviston, 396 Ill. 78 ..... 33, 34
People v. Crooks, 326 Ill. 266 33
People v. Crowe, 390 Ill. 294 ..... 14, 15
People v. Davis, 396 Ill. 432 ..... 31, 35
People v. De Rosa, 362 Ill. 161 32
People v. Easter, 398 Ill. 430 ..... 21, 33
People v. Evans, 397 Ill. 430 ..... 33, 35, 37
People v. Farris, 392 Ill. 267 ..... 32, 33
People v. Freeman, 244 Ill. 590 ..... 13, 14, 20
People v. Fuhs, 390 Ill. 67 ..... 32, 33, 34, 35
People v. Fulimon, 308 Ill. 235 32

PAGE

People v. Geary, 298 Ill. 236 18
People v. Gerke, 332 Ill. 583 33
People v. Gilday, 351 Ill. 11 16
People v. Gilmore, 320 Ill. 233 16
People v. Gruhl, 388 Ill. 52 ..... 32, 34
People v. Haas, 293 Ill. 274 14
People v. Harney, 276 Ill. 236 ..... 32, 35
People v. Hart, 333 Ill. 169 18
People v. Haupris, 396 Ill. 208 ..... 4, 16
People v. Herzberger, 372 Ill. 251 ..... 14, 15
People v. Jensen, 392 Ill. 72 18
People v. Johnson, 298 Ill. 52 ..... 16, 17
People v. Karpovich, 288 Ill. 268 14
People v. Klemann, 383 Ill. 236 ..... 16, 17, 18
People v. Kolb, 238 Ill. App. 173 32
People v. Krauser, 315 Ill. 485 17
People v. Kurant, 331 Ill. 470 33
People v. Kwilosz, 368 Ill. 461 15
People v. Langaas, 339 Ill. 267 14
People v. Lardner, 300 Ill. 264 19
People v. Lavendowski, 326 Ill. 173 ..... 33, 35
People v. Lowhone, 292 Ill. 32 17
People v. Lucania, 360 Ill. 150 14
People v. Marquis, 344 Ill. 261 17
People v. Martin, 380 Ill. 328 14
People v. McElhaney, 394 Ill. 380 31
People v. Parcora, 358 Ill. 448 ..... 28, 33, 34
People v. Peck, 314 Ill. 237 ..... 15, 19
People v. Pennington, 267 Ill. 45 ..... 32, 33
People v. Petrie, 294 Ill. 366 32
People v. Phipps, 338 Ill. 373 ..... 3, 15
People v. Pond, 390 Ill. 237 ..... 34, 37
People v. Rave, 392 Ill. 435 28
People v. Reck, 392 Ill. 311 18
People v. Reynard, 397 Ill. 244 37
People v. Romano, 306 Ill. 502 15

PAGE

People ex rel. Ross v. Ragen, 391 Ill. 419 33
People v. Rusk, 348 Ill. 218 32
People v. Russell, 394 Ill. 192 ..... 33, 34, 37
People v. Schwabauer, 369 Ill. 261 ..... 14, 18
People v. Siracusa, 275 Ill. 457 ..... 32, 35
People v. Stack, 391 Ill. 15 ..... 33, 37
People v. Street, 353 Ill. 60 32
People v. Stubblefield, 391 Ill. 609 34
People ex rel. Swenson v. Fisher, 340 Ill. 250 ..... 35, 37
People v. Sweetland, 210 Ill. App. 432 32
People ex rel. Swolley v. Ragan, 390 Ill. 106 ..... 28, 29
People ex rel. Thompson v. Nierstheimer, 395 Ill. 572 ..... 28, 29
People v. Throop, 359 Ill. 354 ..... 32, 33
People v. Touhy, 397 Ill. 19 29
People v. Van Horn, 396 Ill. 496 ..... 33, 34, 35
People v. Varecha, 353 Ill. 52 ..... 17, 18
People v. Washington, 397 Ill. 122 ..... 35, 37
People v. Wilke, 390 Ill. 598 35
People v. Williams, 383 Ill. 348 ..... 32, 35
People v. Wright, 287 Ill. 580 16
Pippin v. People, 398 Ill. 128 ..... 29, 33
Powell v. Alabama, 287 U. S. 45 ..... 9, 10, 15, 23, 30, 37

Rice v. Olson, 324 U. S. 786 ..... 10, 11, 12, 13, 15, 23, 24, 26, 27, 30, 37

Schwabacher v. People, 165 Ill. 618 16
Smith v. O'Grady, 312 U. S. 329 10
Snyder v. Massachusetts, 291 U. S. 97 25
State ex rel. Drankovitch v. Murphy, 248 Wis. 433 27
State v. Farrell, 223 N. C. 321 17
State v. Garcia, 47 New Mexico 319 26
State v. Lillie, 172 Ore. 205 27
State v. Scofield, 129 Wash. 295 ..... 27, 36

Tomkins v. Missouri, 323 U. S. 485 ..... 10, 11, 12, 16, 27, 37

PAGE

United States ex rel. McCann v. Adams, 320 U. S. 220 ____ 24

Von Moltke v. Gillies, No. 73, Oct. Term 1947 ____ 12, 23, 24, 25

Walker v. Johnston, 312 U. S. 275 ____ 9, 24
White v. Ragen, 324 U. S. 760 ____ 10, 11, 28, 30
Willey v. Hudspeth, 162 Kans. 516 ____ 26
Williams v. Kaiser, 323 U. S. 471 ____ 10, 11, 12, 13
Woods v. Nierstheimer, 328 U. S. 211 ____ 28

STATUTES

Constitution of the State of Illinois:

Article II, Section 9 ____ 39

Constitution of the United States:

Fourteenth Amendment ____ 39

Illinois Revised Statutes, Chapter 38:

Section 103 ____ 18, 40
Section 104 ____ 18, 41
Section 109 ____ 2, 39
Section 590 ____ 16, 17, 41
Section 592 ____ 16, 17, 18, 41
Section 593 ____ 18, 42
Section 730 ____ 4, 5, 32, 33, 43
Section 732 ____ 33, 43
Section 771 ____ 4
Section 806 ____ 16

Judicial Code:

28 U. S. C. 344 ____ 1

TEXTS

PAGE

Criminal Justice in Cleveland, Reports of the Cleveland Foundation (1922) 19

Glueck, Mental Disorder and the Criminal Law (1925) 17

Hynning, Mental Disorder in Illinois Criminal Law (1933), 12 Chicago Kent Law Rev. 19 17

Illinois Association for Criminal Justice, Illinois Crime Survey (1929) 15, 17, 18, 19

Mental Abnormality and Crime, English Studies in Criminal Science (McMillan & Co., 1944) 16

Meredith, Insanity as a Criminal Defense (1931) 16, 17

Michael and Wechsler, Criminal Law and Its Administration (1940) 17

Missouri Association for Criminal Justice, Missouri Crime Survey (1926) 19

Report of Mayor's Committee for Study of Sex Offenses in New York City (1940) 16, 19

The Problem of Sex Offenses in New York City, Report of the Citizens Committee on the Control of Crime (1938) 16, 19

Twelve Months of Crime in New York City, Report of the Citizens Committee on the Control of Crime (1938) 19

Weihofen, Insanity as a Defense in Criminal Law (1933) 16, 17

(1937) 5 Univ. of Chi. L. Rev. 89 16

(1947) 15 Univ. of Chi. L. Rev. 107 28

(1947) 42 Ill. L. Rev. 329 28

35 Ill. Bar Journal 359 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 398

ROY BUTE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Court of Illinois (R. 20-22) is reported at 396 Ill. 588, 72 N. E. (2d) 813.

Jurisdiction

The jurisdiction of this Court is invoked under § 237(b) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. Title 28, § 344).

The decision of the Supreme Court of Illinois is a final judgment of the highest court of the State of Illinois in which a decision in the suit could be had. It was filed on

March 19, 1947 (R. 20). A petition for rehearing was denied on May 19, 1947 (R. 28). Petitioner's motion for leave to proceed in *forma pauperis* in this Court and his petition for certiorari were filed on July 5, 1947 (R. 29), and granted on October 13, 1947 (R. 28).

Questions Presented

1. Whether the due process of law commanded by the Fourteenth Amendment to the Constitution of the United States required the assignment of counsel to petitioner before his plea to the accusation here levelled was accepted.

2. Whether upon the record here presented, as construed by the Supreme Court of Illinois, petitioner intelligently and knowingly waived his right to assignment of counsel.

Constitutional and Statutory Provisions Involved

The relevant provisions of the Constitution of the United States and of the Constitution and statutes of the State of Illinois are set forth in the Appendix, *infra*, page 39 *et seq.*

Statement

On June 17, 1938, petitioner, then aged 57, was charged in two separate indictments, each containing two counts, with having committed the crime of taking indecent liberties with a child on May 19, 1938. Except for the differences in the names and ages of the two children, apparently sisters, the indictments were identical (R. 5-6, 9-11). The first count of each charged petitioner solely in the language of the statute (Ill. Rev. Stat. (1937), c. 38, § 109) with the crime of taking indecent liberties with a child. The second count of each charged peti-

tioner in concrete detail, as well as in the language of the statute with attempting unsuccessfully to commit the substantive offense.[1]

On June 20, 1938, petitioner was arraigned in a proceeding whose formal correctness may be inferred from the language of the judge's minutes (R. 7-9, 12-13):

> "Now on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant in his own proper person also comes; Whereupon the said defendant is furnished with a copy of the indictment, a list of witnesses and jurors herein.
>
> And the said defendant being now arraigned before the bar of this Court moves the Court for leave to enter his plea of Guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein; and the Court having admonished and explained to the said defendant the consequences and penalties, which will result from said plea, and the said defendant still persisting in his desire to enter his plea of guilty to the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein, the court grants such leave.
>
> Thereupon the said defendant enters his plea of guilty of the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein.
>
> * * * * * *
>
> JUDGMENT
>
> Now again on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant Roy Bute, in his own proper person also comes, and the said defendant, Roy Bute, not saying anything further why the judgment of the Court should not now be pronounced against him on his plea of

[1] Both the completed offense and the attempt are included in the statutory definition of the crime. They are separate offenses (*People* v. *Crane*, 302 Ill. 217; *People* v. *Phipps*, 338 Ill. 373) and each is punishable by imprisonment from one to twenty years. See Appendix *infra*, pp. 39-40.

guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein, heretofore entered herein.

Whereupon it is Ordered by the Court that the said defendant, Roy Bute, be and he is hereby sentenced on said plea of guilty as aforesaid to confinement in the Illinois State Penitentiary at Joliet for a period of not less than one (1) year, nor more than twenty (20) years.

* * * * * *

Thereupon by leave of Court first had and obtained, the State's Attorney enters Nolle Prosequi as to the second count of the Indictment herein."

The sentences imposed on each conviction were to run consecutively (R. 13). Petitioner is presently confined in the penitentiary.

Pursuant to leave granted on November 22, 1946, to sue out a writ of error as a poor person (R. 3), petitioner filed in the Supreme Court of Illinois an Abstract of Record, a copy of the common law record and a statement of the errors relied upon.[1] Apart from certain claims of error not here relevant,[2] petitioner contended that he was "denied representation by counsel", that he was "denied due process

---

[1] The statutory writ of error (Ill. Rev. Stat. (1937), c. 38, § 771) is a channel of direct review of criminal convictions. On consideration of writs of error, if no bill of exceptions is filed, the Illinois Supreme Court confines its review to matters appearing in the common law record. *People* v. *Carter*, 391 Ill. 594, aff'd 329 U. S. 173; *People* v. *Haupris*, 396 Ill. 208. The common law record includes the indictment, the judge's minutes of the arraignment, the plea, the verdict and judgment. No bill of exceptions was filed in this case.

[2] Petitioner also contended that the Illinois statute requiring assignment of counsel (Ill. Rev. Stat. (1937), c. 38, § 730) denied to him the equal protection of law which the 14th Amendment requires (R. 18). The Supreme Court of Illinois ruled that this contention "was not raised in the trial court and it cannot be raised for the first time in a court of review" (R. 21). Since this is an explicit ruling on a question of state procedure, however anomalous it may be, the contention would appear to be foreclosed in this Court.

and equal protection * * * because the trial court did not advise him of his rights and of his right to have the assistance of counsel", and that he "was deprived of a fair and impartial trial * * * because he was rushed to trial with such expedition as to deprive him of such trial", all in violation of the State and Federal constitutions (R. 18-19).

In affirming the conviction and sentence, the Supreme Court of Illinois ruled that petitioner was not, as he claimed, denied representation by counsel because "the common-law record discloses * * * [no] attempt to appear and defend by counsel", and there is "no showing that defendant was denied representation by counsel of his own choosing." Nor was he entitled to the appointment of counsel because the common law record does not disclose that he requested appointment of counsel, and "in the absence of a request, there was no duty upon the court to appoint counsel for him." "There is no mandatory constitutional requirement that counsel be assigned" and the Illinois statute authorizing appointment of counsel does not require "the court to provide legal assistance for an accused unless he states upon oath his inability to procure counsel" (R. 20-21).

His claim that he was not advised of his rights was rejected on the ground that there is no "requirement, constitutional or statutory, that the court advise defendant of his rights under the statute. Furthermore, there is no requirement that the waiver of the statutory right to counsel appear upon the face of the judgment order. In the absence of a showing in the record to the contrary, the presumption obtains that the court discharged its duty to the defendant in all respects" (R. 21).

To petitioner's contention that he was rushed to trial with such expedition as to deprive him of a fair trial, the court replied, "Since there is no indication in the record that defendant either requested or was refused additional time within which to prepare his defense, the contention is without merit" (R. 21-22).

Specification of Errors to be Urged

The Supreme Court of Illinois erred

1. In affirming the judgment and sentence of the Circuit Court of LaSalle County..

2. In holding that there is no mandatory constitutional requirement that counsel be assigned to an accused.

3. In holding that petitioner's failure to request assignment of counsel constituted a competent and intelligent waiver of his right to assignment.

4. In failing to hold that, upon the accusation here made, petitioner was constitutionally entitled to the assignment of counsel.

5. In failing to hold that petitioner did not competently and intelligently waive his right to assignment.

6. In failing to reverse the judgment and sentence of the Circuit Court of LaSalle County.

Summary of Argument

Petitioner's conviction without assistance of counsel can only be sustained if he was not entitled to appointment of counsel or if he waived such assistance. He submits that due process of law under the Fourteenth Amendment made appointment of counsel his right, and that he did not waive it.

I

The Fourteenth Amendment requires counsel to be appointed for an accused who is unable, without assistance, to appraise and meet the particular charges with which he is faced. Whether his inability to defend is the result of the accused's personal limitations—of age, education or

intelligence—or a function of the complexity of the legal problems inherent in defense against the particular accusation levelled, the accused's right is to the aid of "counsel of experience and skill." And, in the latter case, the scope of the right is measured by the complexity of the defenses fairly open under the law of the State, not by the defenses to which the evidence in his particular case might confine the accused.

In this case, petitioner was faced with problems of defense which were beyond the reach of "even an intelligent and educated layman." Trial of the charges imperatively required skilled assistance to overcome the "passion or prejudice" which are inevitable concomitants of the accusation of taking indecent liberties with children. Legal defenses, such as intoxication or insanity, are beyond the competence of the "ordinary layman" to comprehend, or to assert effectively on his own behalf in the face of the accusation here made. The distinctions between the felony charged and the cognate misdemeanor are such that, unaided, petitioner could not know of which he was guilty, if either. Nor could petitioner, unassisted, avail himself of the opportunity regularly accorded in Illinois, as elsewhere, to plead guilty to a lesser offense.

So far as the record shows, nothing said or done by either the trial judge or the district attorney afforded petitioner any assistance to compensate for his lack of counsel.

II

Petitioner did not competently waive his right to the legal assistance he is shown to have required. The right to counsel cannot be surrendered effectively unless it is done "with eyes open". And before a court can find such effective surrender there must be some suggestion—however faint—either of fact or of law, that the accused had his eyes open to the right he is asserted to have waived. The record here contains no evidence from which petitioner's knowledge of his right to assignment of counsel

may be inferred. And nothing in the law of Illinois suggests either that he was advised of, or can be presumed to have understood his right. If neither the record nor the Supreme Court of Illinois suggested that petitioner knew of his right to appointment of counsel, this Court cannot find that he competently waived it.

Argument

The Supreme Court of Illinois affirmed petitioner's conviction upon the explicit assumptions that the Constitution of the United States imposes no obligation upon a State to assign counsel to a person accused of serious crime, and that an accused who fails to claim his State created right to assignment of counsel, by that failure alone, waives his constitutional right. Petitioner submits that the Supreme Court of Illinois erred in both assumptions. He contends that in pertinent circumstances an accused is entitled to assignment of counsel "as part of the due process which the Fourteenth Amendment exacts from a State which imposes sentence" (*Foster* v. *Illinois*, 332 U. S. 134, 137) and that his case presents such pertinent circumstances, as they have been delineated by the decisions of this Court. He contends further that, under the decisions here, he cannot be found to have waived his right to assignment of counsel unless he had knowledge of the existence of that right; that he had no such knowledge and that neither the record here nor the law of Illinois suggests that he was aware of his right.

I

Due process of law under the Fourteenth Amendment entitled petitioner to the assignment of counsel before his plea to the indictment lodged against him was accepted.

A. Petitioner was entitled to assignment of counsel if he required legal assistance in order adequately to make his defense to the charges here levelled.

Although it now appears plain that due process of law under the Fourteenth Amendment does not command the assignment of counsel to an accused "in every case, whatever the circumstances" (*Foster* v. *Illinois*, 332 U. S. 134, 137, compare *Johnson* v. *Zerbst*, 304 U. S. 458; *Walker* v. *Johnston*, 312 U. S. 275), it is equally plain that where serious crime is charged, due process of law requires such assignment if assistance of counsel is shown to be "essential to the substance of a hearing", or necessary to afford the accused "ample opportunity to meet an accusation" (*Foster* v. *Illinois*, 332 U. S. 134, 137; *Palko* v. *Connecticut*, 302 U. S. 319, 327). The scope thus delineated for a State's obligation to assign counsel has only recently been articulated in these terms (cf. *Carter* v. *Illinois*, 329 U. S. 173; *Betts* v. *Brady*, 316 U. S. 455). But the decisions here since *Powell* v. *Alabama*, 287 U. S. 45, have consistently invoked a meaningful test of the "essentiality" of counsel's presence to "the substance of a hearing". Repeatedly they have measured the accused's right to assignment of counsel by his demonstrated need for trained assistance in appraising and defending against the particular charges directed at him. While the opinions in some of the cases may have implied broader scope, the decisions point to no narrower a conclusion than that the "opportunity to meet an accusation" is not constitutionally "ample" without the assignment of counsel, when the accused is shown to have been

"incapable adequately of making his own defense" (*Powell* v. *Alabama*, 287 U. S. 45, 71; *Williams* v. *Kaiser*, 323 U. S. 471; *Tomkins* v. *Missouri*, 323 U. S. 485; *Rice* v. *Olson*, 324 U. S. 786).

Since the measure of the right, in non-capital as well as in capital cases (*Rice* v. *Olson, supra*; cf. *Canizio* v. *New York*, 327 U. S. 82; *White* v. *Ragen*, 324 U. S. 760), is thus the inability of the accused to meet the accusation alone, inquiry here has been directed to whether, on the record presented, the particular defendant required legal assistance in order to appraise and answer the particular charges made. Relevant to that inquiry, of course, have been the circumstances surrounding his arrest, detention, arraignment and conviction. Coercive or deceptive practices by the prosecution create their own need for the assistance of counsel, entirely apart from the capacities of the accused or the nature of the charge (cf. *Smith* v. *O'Grady*, 312 U. S. 329; *Ex parte Hawk*, 321 U. S. 114). Relevant also have been the accused's personal limitations —whether of age (cf. *De Meerleer* v. *Michigan*, 329 U. S. 663), intelligence (cf. *Powell* v. *Alabama*, 287 U. S. 45) or education (cf. *Marino* v. *Ragen*, No. 93, October Term, 1947). If, because of them, he is unable to understand his rights or make his defense, his need for assistance, and therefore his constitutional right to appointment of counsel is established.

But the young and the illiterate are not the only defendants who may require legal assistance. Indeed, the articulate premise upon which assignment of counsel is predicated is that "Even the intelligent and educated layman has small and sometimes no skill in the science of law • • • " (*Powell* v. *Alabama*, 287 U. S. 45, 69), and to defend adequately, at least against many types of accusation, he "needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity or of his own ignorance or bewilderment" (*Williams* v. *Kaiser*, 323 U. S. 471, 476). Hence, this Court, examining the specific accusa-

tions levelled in particular cases, has emphasized the subtlety and complexity of the issues facing the defendant. When defense has been found to be of such complexity or difficulty as to be fairly "beyond the capacity of even an intelligent and educated layman" (*Rice* v. *Olson*, 324 U. S. 786, 789; *Williams* v. *Kaiser; Tomkins* v. *Missouri, supra;* cf. *Hawk* v. *Olson*, 326 U. S. 271, 277-278), assignment of counsel has been required. When, however, the case involved only a "simple issue" of fact, and the state court had found that the accused, "a man forty-three years old, of ordinary intelligence," had sufficient "ability to take care of his own interests on the trial of that narrow issue", and had in fact had some prior relevant experience with criminal procedure, assignment was held unnecessary (*Betts* v. *Brady*, 316 U. S. 455, 472). In the light of later decisions here (*Rice* v. *Olson; Tomkins* v. *Missouri; Williams* v. *Kaiser;* cf. *Canizio* v. *New York, supra; White* v. *Ragen*, 324 U. S. 760, 764), the court's conception of the scope of the defendant's need in that case seems unduly narrow. But nothing in that decision suggests that any standard other than the accused's ability to defend against the particular charges levelled determines his right to assignment of counsel.

If the test of the accused's right is thus his incompetence alone to appraise and meet the issues implicit in the charges against him, his right cannot be lost by the fact that the evidence in his case may preclude him from successfully raising or meeting those issues. In establishing his right to assistance, as the decisions here make plain, the accused need not show that the facts in his case would enable him to prevail in his defense, whether it is based upon an attempt to show guilt of only a lesser offense (*Williams* v. *Kaiser; Tomkins* v. *Missouri, supra*) or upon some other ground (*Rice* v. *Olson, supra*). No more need a person whose trial would present sufficient difficulty to require assistance demonstrate that he would prevail if he went to trial (cf. *Hawk* v. *Olson, supra; Adams* v. *U. S.*,

ex rel. McCann, 317 U. S. 269, 279). In each case, his need is measured by the defenses the law of the state fairly allows against the particular accusation, not the defenses to which he would be confined, or which he could sustain, on the evidence that the State might have against him. Any narrower test of his right would nullify the essential object of entitling him to counsel, by denying a fair opportunity to defend on the ground that a court which cannot know all the evidence believes he would have small chance of success, or could only make the kind of defense for which no legal assistance was needed.

By the same token, neither the fact that the defendant pleaded guilty (*Williams* v. *Kaiser; Rice* v. *Olson; Tomkins* v. *Missouri, supra; House* v. *Mayo,* 324 U. S. 42) nor the fact that he failed to request appointment of counsel (*Rice* v. *Olson; Tomkins* v. *Missouri, supra*) alters his right to such assistance. His need for informed aid is hardly lessened by the inadequacy of his own conscious understanding of the possibilities of defense.

This is not to say that an accused who believes he is guilty is obliged to defend, or cannot plead guilty unless he knows what defenses are open in law to the charges against him. Inability to assess and meet an accusation does not, in every case, render a defendant incompetent to decide to plead guilty or to make his own defense. An accused may waive the benefit of assignment of counsel in the very circumstances in which his incapacity to make a defense would entitle him to such assignment (cf. *Rice* v. *Olson, supra,* and compare *Von Moltke* v. *Gillies,* No. 73, Oct. Term, 1947). This is the plain import of *Carter* v. *Illinois,* 329 U. S. 173, 177, where "the accused, with his rights fully explained to him, consciously chose to dispense with counsel", and of *Foster* v. *Illinois,* 332 U. S. 134, 138, where "the court before accepting the plea duly advised [defendant] of 'his rights of Trial' and of the consequences of such a plea". But whether or not the accused "intelligently and understandingly" (*Rice* v. *Olson,* 324 U. S. 786, 789)

chose to plead guilty or to dispense with counsel's aid is a different question, to be resolved, as we shall show, by different criteria, than whether or not his right to a fair opportunity to defend entitled him to skilled assistance.

So far as his right to assistance is concerned, petitioner contends, and the decisions here establish, that due process of law requires assignment of counsel to an accused who is faced with a charge against which he cannot defend without "counsel of experience and skill" (*Rice* v. *Olson*, 324 U. S. 786, 789). To be sure, at least in cases of collateral attack, the accused has the burden of proving that to answer adequately the particular accusation lodged against him he required assistance (*Williams* v. *Kaiser*, 323 U. S. 471; *Hawk* v. *Olson*, 326 U. S. 271). But, if he establishes that the charges levelled could not be fairly evaluated and met by "even an intelligent and educated layman" (*Rice* v. *Olson, supra;* cf. *Hawk* v. *Olson*, 326 U. S. 271, 277-278) he is entitled to assignment of counsel as a matter of constitutional right.

Petitioner submits that, tested by this standard, he was entitled to have counsel appointed for him before his plea of guilty was accepted.

B. Petitioner required the assistance of counsel in order adequately to make his defense to the accusation here levelled.

Petitioner was faced with what has long been recognized as "an accusation easily made, hard to be proved and still harder to be defended by one ever so innocent" (I Hale, Pleas of Crown, 634, as quoted in *People* v. *Freeman*, 244 Ill. 590, 594). It does not require any citation to evidence dehors the record to establish that "in prosecutions for crimes of this kind against children", "public indignation is * * * apt to be aroused" (*People* v. *Freeman*, 244 Ill. 590, 594), and that a person faced with such charges, particu-

larly in a small community [1] within a month after the crime is alleged to have been committed, has more difficulties to overcome in establishing his innocence than does a person accused of assault or larceny or some other offense against the person or property which is less apt to outrage normal citizens (*People* v. *Langaas*, 339 Ill. 267, 274; cf. *People* v. *Lucania*, 360 Ill. 150, 164). In the face of the pressure which such charges thus place upon an accused, petitioner was required to choose among the alternatives which the law of Illinois allowed to meet them.

If petitioner were wholly blameless, his burden could not be carried without assistance. A defense resting upon denial of the acts charged might not only oblige him to take the stand to deny commission of them (*People* v. *Martin*, 380 Ill. 328; *People* v. *Freeman; People* v. *Langaas, supra;* compare *People* v. *Crowe*, 390 Ill. 294), but would require him to attempt to impeach or rebut such evidence as the State might produce either by the prosecutrix (cf. *People* v. *Karpovich*, 288 Ill. 268; *People* v. *Schwahauer*, 369 Ill. 261) or in corroboration (cf. *People* v. *Herzberger*, 372 Ill. 251; *People* v. *Crane; People* v. *Freeman; People* v. *Martin*, 380 Ill. 328) and, in turn, to offer character and reputation evidence which would be sufficiently convincing to overcome the State's case (*People* v. *Bernsee*, 367 Ill. 518; *People* v. *Martin*, 380 Ill. 328; *People* v. *Langaas*, 339 Ill. 267; *People* v. *Haas*, 293 Ill. 274; cf. *People* v. *Crane*, 302 Ill. 217). The decisions of the Illinois Supreme Court leave little doubt that on the accusation here levelled "even the intelligent and educated layman", "unfamiliar with the rules of evidence" stands in imminent danger of being "put

[1] The offense was alleged to have been committed in LaSalle County. Sources not constituting part of the common law record indicate that the locus of the crime charged was a public park in Streator, Ill., a town of 15,000 people (Rand McNally World Atlas, 1940).

on trial without a proper charge,[1] and convicted upon incompetent evidence,[2] or evidence irrelevant to the issue [3] or otherwise inadmissible" [4] (*Powell* v. *Alabama*, 287 U. S. 45, 69). It may be doubted that in this case, the "skill and knowledge adequately to prepare his defense, even though he have a perfect one" are within the reach of the average layman (cf. *Powell* v. *Alabama*, 287 U. S. 45, 69). But even if petitioner could prepare his own defense, "evidence and truth are of no avail unless they can be adequately presented * * * in court" (*Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279). To assert that the presentation of a defense—whether before a judge or jury—in the shadow cast by the accusation here lodged, would require the most delicate kind of judgment and the highest degree of skill at the trial is to understate petitioner's task. Regardless of how competent a layman of "ordinary intelligence" might be to conduct the trial of any conventional offense against property (cf. *Betts* v. *Brady*, *supra*), there can be little doubt that to establish innocence of the offense here charged "counsel of experience and skill" (*Rice* v. *Olson*, *supra*) was required.

If petitioner's defense rested not upon blamelessness in fact, but upon a legally recognized excuse, such as intoxication or insanity,—defenses which have a demonstrated rele-

---

[1] See e.g. *People* v. *Crane*, *supra*; *People* v. *Phipps*, 338 Ill. 373.

[2] See e.g. *People* v. *Phipps*; *People* v. *Bernsee*, *supra*; *People* v. *Kwilosz*, 368 Ill. 461; *People* v. *Romano*, 306 Ill. 502.

[3] Compare *People* v. *Bernsee* and *People* v. *Herzberger*, *supra*, with *People* v. [illegible]*ck*, 314 Ill. 237; cf. *People* v. *Crowe*, *supra*.

[4] It does not detract from the difficulty of a defendant's task to note that during the only period for which statistics are available, 1917-1927, at least six of the fifteen cases of crimes against children brought to the Illinois Supreme Court were reversed; reversal because of erroneous exclusions or admissions of evidence predominated among such cases (Illinois Association for Criminal Justice, Illinois Crime Survey (1929), pp. 116-117).

vance to the crime charged [1]—his capacity to perceive its availability would depend upon a knowledge of distinctions in Illinois law which are "unknown to the average layman" (*Tomkins* v. *Missouri*, 323 U. S. 485, 488). The "specific intent" which is of the essence of the crime may be disproved by a showing of intoxication (*People* v. *Klemann*, 383 Ill. 236) or insanity (Ill. Rev. Stat. (1937), c. 38, §§ 590, 592; cf. *People* v. *Gilmore*, 320 Ill. 233; *People* v. *Johnson*, 298 Ill. 52). The tests by which Illinois determines the sufficiency of the defenses of intoxication [2] or

---

[1] See e.g. The Problem of Sex Offenses in New York City, Report of the Citizens Committee on the Control of Crime (1938), pp. 9-10. The particular offenses here charged "because of their inherent nature, warrant a presumption of mental abnormality in the criminal." Of the 55 persons charged with the felony here involved, 10 were found insane and seven mentally defective. Of 60 persons charged with the cognate misdemeanor, 13 were found insane and 17 mentally defective. But *cf.* Report of Mayor's Committee for Study of Sex Offenses (1940), Ch. VII. See also, Mental Abnormality and Crime, English Studies in Criminal Science (McMillan & Co., 1944), Ch. VIII, IX; compare treatment of sex offenders in Illinois prisons (1937), 5 Univ. of Chi. L. Rev. 89, 91.

Although it is not part of the common law record (*People* v. *Haupris*, 396 Ill. 208), it may be noted, in considering the defenses fairly open to petitioner, that he was characterized in the official statement which the convicting judge forwarded to the warden of the prison pursuant to Ill. Rev. Stat. (1937), c. 38, § 806, as a "low grade moron" and that he appears to have a record of habitual drunkness.

[2] Compare *Schwabacher* v. *People*, 165 Ill. 618, 630 (defendant must be "incapable of forming such intent") with *People* v. *Klemann*, 383 Ill. 236, 239 (defendant must prove he "was intoxicated to that degree that he was incapable of entertaining the specific intent, and that he neither then nor afterwards yielded it the sanction of his will") *cf. People* v. *Cozzie*, 397 Ill. 620; *People* v. *Wright*, 287 Ill. 580. See also *People* v. *Gilday*, 351 Ill. 11, where only the first portion of the latter test seems to be applied, and *People* v. *Cochran*, 313 Ill. 508, which adverts to the relationship between intoxication and insanity. Compare Meredith, W. C. J., Insanity as a Criminal Defense (1931), pp. 56-59; Weihofen, H., Insanity as a Defense in Criminal Law (1933), pp. 87-94.

insanity [1] are no less elusive than those constantly found difficult to comprehend by trained criminologists and lawyers.[2] Without assistance, petitioner could not know whether they covered his case even if he could discern their general availability. And, if he did understand their applicability, his capacity to present them by himself would hardly be "adequate". The evidence to sustain a defense of intoxication is itself so damaging (cf. *People* v. *Klemann*, *supra*) that its presentation must necessarily be made in a manner which is sufficiently persuasive to overcome the prejudicial effects upon the trier of facts which its mere assertion would import in a case of this character. A different, but no less difficult, problem [3] would confront the

---

[1] In 1929, the Illinois Association for Criminal Justice observed that "from the standpoint of *principle* there is no phase of the criminal law more puzzling, nor one that is more unsatisfactory" than that dealing with insanity as a defense (Illinois Crime Survey, *supra*, p. 136). See generally C. J. Hynning, Mental Disorder in Illinois Criminal Law (1933), 12 Chicago Kent Law Rev. 19; Illinois Crime Survey, *supra*, c. XV. Illinois formally appears to prescribe the "good and evil" test as the determinant of a defendant's sanity (*cf.* Ill. Rev. Stat. (1937), c. 38, §§ 590, 592). But see *O'Shea* v. *People*, 218 Ill. 352; *People* v. *Lowhone*, 292 Ill. 32; *People* v. *Marquis*, 344 Ill. 261; *People* v. *Cochran*, 313 Ill. 508; *People* v. *Krauser*, 315 Ill. 485; *People* v. *Varecha*, 353 Ill. 52, for the varieties of mental condition it covers, and the relationships which must obtain between the acts charged and the accused's mental condition; and compare *People* v. *Johnson*, 298 Ill. 52. Particularly relevant here is the possibility that a person of "sub-normal mentality" (*People* v. *Marquis*, at 267; *People* v. *Varecha*, *supra*), or an habitual drunkard (*People* v. *Cochran*, *supra*) might come within the defense.

[2] See Weihofen, H., Insanity as a Defense in Criminal Law (1933), pp. 14-147; and generally Glueck, S. S., Mental Disorder and the Criminal Law (1925); Meredith, W. C. J., Insanity as a Criminal Defense (1931); Michael and Wechsler, Criminal Law and Its Administration (1940), pp. 807-860, 903-920.

[3] See Hynning, *supra*, n. 1, and Michael and Wechsler, *supra*, n. 2, at pp. 860-902. See also *State* v. *Farrell*, 223 N. C. 321.

accused who attempted to establish his own insanity at the time of committing the acts charged.[1]

If petitioner were guilty at most of the misdemeanor of contributing to the delinquency of a minor, he could not respond intelligently to the indictment without knowing the distinctions between the offense charged and that of which alone he might be guilty. The former requires a specific intent (*People* v. *Klemann, supra*). The latter requires only that a person shall "knowingly or wilfully cause, aid or encourage", or "do acts which directly tend to" induce, a child to commit "indecent or lascivious conduct" (Ill. Rev. Stat. (1937), c. 38, §§ 103, 104). In some cases the same acts may sustain a conviction of either offense (cf. *People* v. *Jensen*, 392 Ill. 72; *People* v. *Schwabauer*, 369 Ill. 261). Distinction between the two offenses would then turn upon intent. But whether the difference in petitioner's case could be shown to lie in the acts proved or in the intent they might disclose, the distinctions are subtle. Which of them, if any, petitioner could urge successfully on the facts here[2] only the practiced eye of competent counsel could perceive. That perception assumes crucial

---

[1] Entirely apart from thus asserting his innocence, petitioner might have been subject to commitment, rather than conviction and imprisonment, under Ill. Rev. Stat. (1937), c. 38, §592, which provides that a person who is found by a special jury impanelled for the purpose to be "insane or feebleminded" at the time of the trial, is to be committed to the Department of Public Welfare until he has recovered, when he is to stand trial. (See also, Ill. Rev. Stat. (1937), c. 38, § 593; compare *People* v. *Varecha*, 353 Ill. 52). But 'The duty and responsibility of raising the question whether the defendant was insane at the time of the trial rests upon him and his counsel. It is not the duty of the court * * * " (*People* v. *Hart*, 333 Ill. 169, 173; *People* v. *Reck*, 392 Ill. 311). And the test of insanity is not the same here as it is when urged as a defense (*cf. People* v. *Geary*, 298 Ill. 236). Argument is hardly necessary to establish that without counsel it is impossible for a defendant to raise that question or prove his rights under the statute.

[2] It is not irrelevant in this connection that in 1926, in Chicago, of 114 persons charged with felonious sex offenses of one sort or another, 23 were convicted, 10 for the misdemeanor of contributing to delinquency (Illinois Crime Survey, *supra*, p. 313).

significance when it is understood that petitioner could not, under Illinois law, have been convicted on both counts of the indictments. The essence of the attempt charge is failure. Successful completion of the offense makes impossible conviction for the attempt (*People* v. *Lardner*, 300 Ill. 264; compare *People* v. *Crane* with *People* v. *Peck*, *supra*). In pleading guilty petitioner gained nothing and gave up every chance of establishing either his innocence of any offense, or his guilt of only a lesser offense. Without counsel he could not even know of these opportunities, much less pursue them.

Finally, if petitioner believed he had no defense, there was still another course open to him under the law of Illinois. As in other states,[1] the prosecuting authorities in Illinois not uncommonly accept a plea of guilty to a lesser offense.[2] The frequency with which such pleas are

---

[1] The available data suggests that the Illinois practice lies between the extremes found in other States. Expressed as a percentage of all persons charged with serious crime, pleas of guilty to a lesser offense were accepted in approximately 13% of the Illinois cases in 1926, 8% of the Cleveland cases in 1919, 6% of the Missouri cases in 1922-24, and 47% of the New York City cases in 1938. (See Illinois Crime Survey, *supra*, p. 207; Criminal Justice in Cleveland, Reports of the Cleveland Foundation (1922), pp. 237, 322; Missouri Crime Survey, Report of the Missouri Association for Criminal Justice (1926), pp. 315, 319; Twelve Months of Crime in New York City, Report of the Citizens Committee on the Control of Crime (1938), pp. 8-9.)

[2] In 1926, the only year for which relevant statistics can be found, 28.6% of all persons found guilty of crime in 8 counties similar in character to LaSalle County were so found on pleas to a lesser offense. This compares with an average of 28.31% for the State as a whole (See Illinois Crime Survey, *supra*, p. 261).

Convictions of lesser offenses in Chicago are shown to have been rendered in almost 50% of the felonious sex charges where guilt was established. Of 114 accusations only 23 were convicted, of which 11 were for lesser offenses (Illinois Crime Survey, *supra*, pp. 312-313). Compare acceptance of even larger proportions of pleas to lesser offenses when the crime here involved is charged in New York. See The Problem of Sex Offenses in N. Y. City, Report of the Citizens Committee on the Control of Crime (1938), p. 21; Report of Mayor's Committee for Study of Sex Offenses in New York City (1940), Ch. III, IV, which covers the period 1930-1939.

accepted points inexorably to the conclusion that in the administration of the criminal law, accusations, even of crimes as socially irritating as that here charged, are not infrequently bottomed upon evidence which the prosecutor is not confident the community would accept as sufficient in the particular case to merit the harsh penalties the statutes impose. That petitioner, upon whose record there is not the slightest suggestion of previous contact or familiarity with the operation of the criminal law, required the assistance of counsel to develop and present such mitigating elements as might have induced the acceptance of a plea to a lesser offense cannot be doubted.

In short, petitioner was faced with a charge which by its very making created an ominous atmosphere of "passion or prejudice" (*People* v. *Freeman, supra*). Wholly apart from any need he may have had for technical skill, he required the calm and dispassionate advice of an unaffected third party. Of his own knowledge, he could not tell whether whatever he had done subjected him to any punishment, to punishment for the crime charged or to punishment for a lesser offense. If he were innocent—either in law or in fact—he had neither the knowledge nor the skill to establish it on trial; if he were guilty only of some lesser offense, he could neither know it nor assert it without trained assistance; if he were entitled to commitment rather than conviction, he required a third person's informed intervention; and if he were to claim the opportunity, regularly accorded to others, to plead guilty to a lesser offense, he needed the assistance of someone "learned in the art".

If by the nature of the charges against him, petitioner required the assistance of counsel, the circumstances of his arraignment disclose no amelioration of that need. The skeletal common law record contains scant information as to what transpired at the arraignment. But, if the judge's minutes do not imply a curt, unquestioned and unquestioning conviction of petitioner, they certainly do

not suggest that either the judge or the prosecuting attorney displayed any concern for his lack of counsel or any effort to accord him such careful consideration as might therefore be his due.

The conclusion that petitioner thus required legal aid and advice in order to know whether and how to defend is not weakened by anything found by the Supreme Court of Illinois (compare *Betts* v. *Brady*, 316 U. S. 455, 472). On the contrary, the opinion of that Court does not disclose the slightest awareness of the express admonition that "There are situations when justice cannot be administered unless persons charged with crime are defended by capable and responsible counsel" (*Carter* v. *Illinois*, 329 U. S. 173, 179), or that "in the circumstances of a 'particular situation', assignment of counsel may be 'essential to the substance of a hearing' as part of the due process which the Fourteenth Amendment exacts from a State which imposes sentence" (*Foster* v. *Illinois*, 322 U. S. 134, 137).[1] In view of its erroneously narrow conception of the State's constitutional duty, it made no effort of any kind to measure petitioner's claim by the test of his need.

Nor does anything either said or held in *Foster* v. *Illinois* detract from the conclusion here reached. We do not read that decision to rule that Foster and Payne were not in need of legal assistance to make their defense, or that if they were, it was not their constitutional right to have such assistance assigned. We understand it to hold that because they were presumed to have been advised as to their right to counsel, their failure to enjoy the right was the result of their voluntary determination to dispense with it, and therefore their conviction was not obtained in violation of the Fourteenth Amendment. If, however, we misread the opinion, we respectfully submit

[1] See *People* v. *Easter*, 398 Ill. 430, 431, for a similar ruling by the Supreme Court of Illinois citing this Court's decision in *Foster* v. *Illinois*.

that the need of petitioner in this case for trained assistance was significantly greater than that of Foster and Payne. To be sure they were faced with difficult questions in responding to their indictment. But so was petitioner. And in addition, here, both the decision as to how to respond and the process of making the defense depend vitally upon a careful appraisal of evidence and the ability to present it effectively. Whatever might be presumed about the capacity of two men of "ordinary intelligence" to defend against a charge of burglary (*Betts* v. *Brady*, 316 U. S. 455), it plainly is impossible for anyone but an experienced trial lawyer adequately to defend a single accused against a charge such as is here levelled, whether the defendant's need is to choose a defense or to "put his case effectively in court" (*Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279).

II

Petitioner did not waive the assistance of counsel to which he was entitled.

If petitioner was thus entitled to assignment of counsel in order to meet the accusation against him, his conviction without such appointment deprived him of his liberty without the due process of law which the Fourteenth Amendment commands, unless he voluntarily dispensed with such assistance. Petitioner submits that he did not waive the assistance of counsel to which he was entitled.

First: The Constitution, as we have noted, does not compel an accused either to defend against a charge of crime, or to seek or accept legal assistance for which he feels neither the need nor the desire. But, while it leaves him free, if he chooses, to plead guilty, it requires that he be offered a fair choice. And it is of the essence of such a choice that he who chooses knows that there are alterna-

tives from which to select. If the defendant is not "fully advised of all its implications and capable of understanding them", his plea of guilty is not competently made (*Carter* v. *Illinois*, 329 Ill. 173, 174; cf. *DeMeerleer* v. *Michigan, supra; Von Moltke* v. *Gillies*, No. 73, Oct. Term, 1947). Hence, although he need not have "the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt" (*Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 277), before such an admission can fairly be accepted a layman must be informed, or at least be aware, of his right to make a defense.

Where, by definition, the assistance of counsel is essential to his right to make a defense, the ordinary layman plainly is not fully aware of the implications of his plea of guilty if he does not understand that such assistance will be furnished as part of his opportunity to defend (cf. *Rice* v. *Olson*, 324 U. S. 786). The narrowest premise upon which an accused is entitled to assignment of counsel is that he does not know what defenses are open to him and would be unequipped to pursue them even if he knew. It may not be going beyond the outer edges of "essential fairness" (*Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 279, but compare *Von Moltke* v. *Gillies, supra*) to hold that in such ignorance he is making a free and intelligent choice when he decides to plead guilty, especially if his ignorance is a function of incompetence "in the science of law" rather than of "feeblemindedness, illiteracy, or the like" (cf. *Powell* v. *Alabama*, 287 U. S. 45, 69, 71). But the "opportunity to be heard" is a chimera if in the proved condition of such ignorance he is to be permitted to plead without having the slightest understanding that legal advice will be provided for him if he cannot afford to procure his own counsel.

In clear recognition of this, only recently this Court observed that the essential purpose of the Sixth Amendment is "to protect an accused from conviction resulting from his own ignorance of his legal and constitutional

rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution" (*Johnson* v. *Zerbst*, 304 U. S. 458, 465). Repeatedly, therefore, it has insisted that to be effective, surrender of the right must be made not only voluntarily (*Walker* v. *Johnston*, 312 U. S. 275), but "with eyes open" (*Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 279; *Von Moltke* v. *Gillies*, *supra*).

If that is true under the Sixth Amendment, the demonstrated need for help, which alone brings the right into being under the Fourteenth Amendment, plainly requires the accused to know of his right, if not to enjoy its fruits, before his plea can be accepted or his conviction sustained (*Rice* v. *Olson*, 324 U. S. 786). To be "an intentional relinquishment or abandonment of a known right or privilege" (*Johnson* v. *Zerbst*, 304 U. S. 458, 464) an accused's decision to dispense with the aid that is "essential to the substance of a hearing" must be made with "full knowledge of his rights and capacity to understand them" (*U. S. ex rel. McCann* v. *Adams*, 320 U. S. 220, 221). Without doubt, when aware of his right, the accused is not obliged to seek the assistance of counsel. But before he can competently forego it, he must know of its availability.

Second: While, at least in a collateral attack upon a federal conviction, the burden is on the accused to prove that he did not competently dispense with the assistance of counsel (*Johnson* v. *Zerbst*, 304 U. S. 458, 468), the import of the decisions here is that he sustains that burden if there is no suggestion in the record from which it can be inferred that he was aware of his right. If there is any evidence to show, however weakly, that he knew of the availability of assistance, it is possible to infer from his silence that he voluntarily and intelligently declined it, and the burden is on him to show otherwise. But if there is no suggestion that he knew of it, to infer waiver from silence would be to presume that very "acquiescence in the loss of

fundamental rights" which this Court has consistently refused to do (*Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio,* 301 U. S. 292, 307). The narrowest, if not the only, meaning of indulging "every reasonable presumption against waiver" of the assignment of counsel (*Johnson* v. *Zerbst,* 304 U. S. 458, 464; *Von Moltke* v. *Gillies, supra; Glasser* v. *United States,* 315 U. S. 60, 70, and compare *Hodges* v. *Easton,* 106 U. S. 408, 412) is that the absence of any evidence from which knowledge of his right can be inferred implies that the accused was ignorant of it; and, therefore, intelligent surrender of it cannot be inferred. And certainly, the rigorous test of waiver upon which this Court relied so heavily for the result in *Patton* v. *United States,* 281 U. S. 276, and *Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269, does not suggest that less than some evidence, however meagre, of the accused's awareness of his right will suffice to find it waived.

Every consideration that underlies the requirement of "express" consent to sustain a finding of waiver of jury trial in criminal (*Patton* v. *U. S.,* 281 U. S. 276; *Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269) or civil (compare *Hodges* v. *Easton,* 106 U. S. 408) cases applies with at least equal force where assignment of counsel, even under the Sixth Amendment, is concerned. Not only as a general matter is the assistance of counsel more essential than a jury trial to the concept of a fair hearing (cf. *Palko* v. *Connecticut,* 302 U. S. 319, 325, 327; *Snyder* v. *Massachusetts,* 291 U. S. 97, 116), but the ground upon which it is predicated is the ignorance of the accused. The premise that calls the right into being demands some evidence of the defendant's appreciation of its existence before he can be found to have waived it (*Johnson* v. *Zerbst, supra*). And where, as under the Fourteenth Amendment, the assignment of counsel is required only because it is proved in the particular case to be "essential to the substance of a hearing," by that very proof the accused has borne "the burden of showing essential unfairness * * *, not as a mat-

ter of speculation but as a demonstrable reality". The right to assignment of counsel established in such a context can hardly be less "jealously guarded" (cf. *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 280, 281) than the right under the Sixth Amendment, which exists "in every case, whatever the circumstances" (*Foster* v. *Illinois, supra*) or the right to jury trial, which is not essential to "a fair and enlightened system of justice" (*Palko* v. *Connecticut*, 302 U. S. 319, 325).

However implicit may be such a requirement under the decisions here, petitioner does not contend that waiver of the assistance of counsel can only be effective if it "appears affirmatively" on the face of the record. He does not urge that an accused's competent consent to surrender his right must be explicitly set forth in the record or that his consent can only be inferred if the record shows that the trial judge expressly advised him as to his right, or that, in fact, the trial judge must always proffer such advice. Less than such evidence, albeit more than the mere fact of a plea of guilty (*Rice* v. *Olson, supra*) may suffice to sustain the inference that the accused knew of his right to assistance of counsel and, therefore, by his silence voluntarily surrendered it.[1] Indeed, in cases coming here from State courts, if the local law is construed by the State courts to obligate the trial judge to inform an accused of his right to assignment of counsel, possibly such obligation may be enough, without any record showing that it was performed, to sustain the inference that petitioner was

[1] See e.g. *Fairce* v. *Amrine*, 154 Kans. 618; *Hill* v. *Hudspeth*, 161 Kans. 376, cert. den. 329 U. S. 756; *Willey* v. *Hudspeth*, 162 Kans. 516 (The trial judge stated it was his regular practice to advise defendants of their rights); *Michener* v. *Johnston*, 141 F. (2) 171, 146 F. (2) 129 (C. C. A. 9), cert. den. 324 U. S. 874 (The U. S. Attorney had advised the defendant of his rights); *Logan* v. *Johnston*, 28 F. Supp. 98 (N. D. Cal.), appeal dismissed 108 F. (2) 1016 (C. C. A. 9) (The defendant bargained for a lesser plea); *Ex parte D'Elia*, 51 F. Supp. 542 (E. D. Ky.) (The defendant previously had been indicted upon similar charges, and had been assisted by counsel); see also *State* v. *Garcia*, 47 New Mexico 319.

aware of his rights and waived them by silence or a plea of guilty.[1] But if there is no evidence, however miniscule—either in fact or in State law—to suggest that the accused knew of his right to appointment of counsel, petitioner submits an accused cannot be found to have waived it.

THIRD: Whether there is such evidence, either of law or of fact, will depend, "in each case, upon the particular facts and circumstances surrounding that case" (*Johnson* v. *Zerbst*, 304 U. S. 458, 464; *Rice* v. *Olson, supra*). When, as appears to be the most usual practice, the question of waiver is presented on collateral attack[2]—whether in a state or federal court—the tribunal in which the attack is launched may take evidence in addition to that contained in the record of the conviction in order to resolve the question. The issue here will be the correctness of the decision reached on the narrow question of waiver by the court which examined the evidence appearing in the record on review. When, however, the question of waiver is raised on direct attack—i.e., by appeal or other direct review of the conviction[3]—there is no opportunity for evidence, beyond that already in the record, to be presented to the trial court. There is also small likelihood that the question of waiver will have been resolved explicitly by that court. Accordingly, unless additional evidence may be presented on review, the reviewing court is confined to those facts appearing of record or which it may judicially notice. And it will rarely have the benefit of the explicit conclusions of the judge who heard those facts.

---

[1] See e.g. *In re Application of Loundagin*, 129 Ore. 652; *State* v. *Lillie*, 172 Ore. 194, 205; *State* v. *Scofield*, 129 Wash. 295; compare *State ex rel. Drankovitch* v. *Murphy*, 248 Wis. 433; *Harris and May* v. *State*, 203 Ind. 505; *Knox County Council* v. *State ex rel. McCormick*, 217 Ind. 493, 511.

[2] See e.g. *Canizio* v. *New York*; *Tomkins* v. *Missouri*; *Rice* v. *Olson*; *DeMeerleer* v. *Michigan*; *Johnson* v. *Zerbst, supra*; *Cochran* v. *Kansas*, 316 U. S. 255; see also cases cited note 1, *supra*.

[3] See e.g. *Patton* v. *United States*; *Carter* v. *Illinois, supra*.

The situation here presented is a singular species of the latter genus. The record not only contains no decision on the question of waiver by the trial court, but, by the restrictions of Illinois law, it is unhappily thin in evidence as to what manner of man the defendant was, or what transpired at his arraignment. That, of course, does not alter the duty of this Court. Whether this case comes here by way of collateral attack or on direct review, the question is the same: Is there any suggestion that petitioner knew of his right, so that waiver might be inferred from his silence? And while light may be shed by the rulings of the courts below, the answer must be found in the record presented to this Court—however sparse it may be.

It is no answer, particularly in a proceeding coming here from a State court, to suggest that there might be available for the petitioner some other procedure for making his claim on a more complete record. That no other procedure was available to him under Illinois law in 1946, hardly can be doubted in view of the decisions of the Illinois courts [1] and the position theretofore apparently taken by its Attorney General.[2] Whether any other procedure is now available is a much mooted question. In spite of the recent concession of the Attorney General of Illinois in *Marino* v. *Ragen, supra,* the latest utterances of the Illinois Supreme Court appear plainly to confine petitioner to the

---

[1] Habeas corpus was precluded by the decisions in *People ex rel. Swolley* v. *Ragan,* 390 Ill. 106; *People ex rel. Thompson* v. *Nierstheimer,* 395 Ill. 572; cert. den. 330 U. S. 831. The statutory writ of error coram nobis was unavailable both because of the nature of the claim made (*People* v. *Parcora,* 358 Ill. 448) and the 5-year limitation (*People* v. *Rave,* 392 Ill. 435). See also (1947) 15 Univ. of Chi. L. Rev. 107, 118-131; (1947) 42 Ill. L. Rev. 329; 35 Ill. Bar Journal 359.

[2] See e.g. briefs of respondent in *White* v. *Ragen,* 324 U. S. 760 (pp. 8-14); *Woods* v. *Nierstheimer,* 328 U. S. 211 (pp. 3-8); *Foster* v. *Illinois,* 332 U. S. 134 (pp. 13-16).

remedy here invoked.[1] And we are aware of no Illinois lower court opinions to the contrary. It is one thing, in accepting a confession of error on the merits, to accept also the unsupported concession of the Attorney General as to the law of Illinois. It is quite another to accept such an assertion as a governing principle in a case in which the petitioner may lose his right. At the very least, we may ask for some word from the courts of Illinois to support the Attorney General's position.

But, whether or not Illinois now furnishes an additional "corrective judicial process" in compliance with its duty under *Mooney* v. *Holohan*, 294 U. S. 103, there is no disputing that it plainly prescribes the procedure petitioner has chosen (*People ex rel. Thompson* v. *Nierstheimer*, 395 Ill. 572). If that procedure, adopted by petitioner in conformity with State law, does not comply with the State's notion of the most appropriate procedure for the vindication of Constitutional right, the State is free to block it off and provide a substitute which will be both more adequate for the accused and more suitable to the State's

[1] *People ex rel. Thompson* v. *Nierstheimer*, *supra*, especially when read in the light of *People ex rel. Swolley* v. *Ragen*, *supra*, renders habeas corpus inappropriate. And *People* v. *Touhy*, 397 Ill. 19, even without the explicit concession of the Attorney General in *Marino* v. *Ragen* (see Response to petition for certiorari, p. 5) renders coram nobis inappropriate more than 5 years after conviction.

That the Attorney General's views in the matter of collateral remedies may not be shared by the Illinois Courts is suggested by comparison of his position in *Marino* v. *Ragen* (see Response, p. 6) with the opinion of the Supreme Court of Illinois in *Pippin* v. *People*, 398 Ill. 128 (Sept. 18, 1947), which denied on the merits a claim apparently similar to that here made, although the wrong must have been as apparent to the trial judge there as it was here. If coram nobis is thus the appropriate channel for asserting constitutional wrongs known to the trial court but not of record, the Supreme Court of Illinois is not wholly in accord with the distinction between coram nobis and habeas corpus urged here in *Marino* v. *Ragen* by the Attorney General.

conception of the proper administration of criminal justice. Until then, petitioner's rights must be tested in the field the State provided therefor, by the standards this Court has found in the Constitution. Those standards do not, of course, differ with the differing procedural devices the State of Illinois may prescribe for the vindication of constitutional right.

FOURTH: If, in applying those standards to the record in this case, this Court is not obliged to accord petitioner any special generosity of inference from those facts which are of record, neither is it entitled to read the record more grudgingly against him than is authorized by the law of Illinois [1] or than did the Supreme Court of Illinois in this case (cf. *Ashcraft* v. *Tennessee*, 322 U. S. 143, 147-148).

The most careful and searching examination of this abbreviated record does not reveal the smallest peg on which to hang the inference that petitioner knew of his right to have counsel assigned to him, or indeed of his right to secure his own counsel to represent him. Petitioner was a lone defendant (compare *Foster* v. *Illinois, supra*). From the record we know nothing of his training, experience or mental competence. But it is not irrelevant that in June, 1938, when he was arraigned, *Betts* v. *Brady, supra*, had not yet been decided and "even an intelligent and educated" layman could hardly know of a constitutional right which did not take relevant shape until 1945 when *Rice* v. *Olson*, 324 U. S. 786, first applied the principle of *Powell* v. *Alabama* to a non-capital case (cf. *White* v. *Ragen*, 324 U. S. 760). Petitioner is not shown to have been convicted of any prior offenses or to have served any prior penitentiary sentences—experiences which provide their own unique education in the rights of an accused (cf. *Betts* v. *Brady*). Indeed, the only information the record offers about him is the crime with which

[1] Compare *Aero Mayflower Transit Co.* v. *Commissioners*, No. 39, Oct. Term, 1947, and cases cited at note 9.

he is charged and the plea he made. Even if his plea could make the charge relevant, the accusation hardly suggests the kind of legal learning which might be inferred from an accusation charging a complicated scheme to defraud. Nor does petitioner's willingness to subject himself, by his pleas of guilty, to the maximum sentence possible on these indictments indicate even that sophistication which is implicit in an attempt to bargain with the prosecutor. In these circumstances, the only evidence to sustain the inference that petitioner knew of his rights must come from such advice as the Court or State's Attorney addressed to him.

But in contrast to other common law records in Illinois (e.g., *People* v. *McElhaney*, 394 Ill. 380; *People* v. *Davis*, 396 Ill. 432), the record here contains nothing to suggest that at any time petitioner was apprised either that he could be represented by his own counsel or that the Court would provide him with counsel if he were unable to afford it. In fact, apart from pronouncing sentence, the only advisory communications which the judge's minutes disclose that he addressed to the accused were that he "furnished [him] with a copy of the indictment, a list of witnesses and jurors herein" and "admonished and explained to . . . [him] the consequences and penalties which will result from" his plea of guilty.

Unless the record is to import instructions or advices which it does not suggest explicitly, or the single admonition explicitly recorded is to be read with an eye that sees more than can reasonably be inferred, petitioner received no enlightenment from the court as to his right to be assigned counsel. Petitioner submits that no such reading of the record is possible, and significantly, no such reading was made by the Supreme Court of Illinois in this case, or in any other case ever before it.

In determining what the judicial advice noted in this record can be said to import, we start with the rulings of the Illinois Supreme Court on the proper interpreta-

tion of the common law record. That court, over a long period of years, and in response to a wide variety of claims, has established that while such a record "imports verity, rather than an opposite conclusion that the interests of the accused were injuriously affected" (*People* v. *Street*, 353 Ill. 60, 63), it must contain at least some evidence that the rights which Illinois accords to an accused were in fact extended, if the conviction is to be sustained. Hence, where the statutes of Illinois are construed to impose an affirmative obligation upon a judge, as e.g., to admonish the accused as to the consequences of pleading guilty, the record must show performance of that duty (*People* v. *Fulimon*, 308 Ill. 235; *People* v. *Petrie*, 294 Ill. 366; *People* v. *Rusk*, 348 Ill. 218; *People* v. *Cooper*, 366 Ill. 113). To be sure, the slightest notation of such performance will be taken to import the fullest and plainest explanation the law requires.[1] But if the record does not show even a notation as to the performance of that duty, no presumption that it was performed will be indulged (*People* v. *Petrie*, 294 Ill. 366; *People* v. *Fulimon*, 308 Ill. 235; *People* v. *Benner*, 224 Ill. App. 515; *People* v. *Sweetland*, 210 Ill. App. 432; *People* v. *Kolb*, 238 Ill. App. 173; compare *People* v. *Rusk*, 348 Ill. 218, 222).

In sharp contrast to the judicial duty to admonish an accused as to the consequences of his guilty plea before accepting it, and perhaps to the judicial duty to assign counsel in a capital case (Ill. Rev. Stat. (1937), c. 38, § 730; compare *People* v. *Bernovich*, 391 Ill. 141, cert. den. 326 U. S. 798), is the Illinois conception of the judicial duty to assign counsel or to advise the accused of his right to have counsel assigned in a non-capital case (compare *People* v. *Gruhl*, 388 Ill. 52). More than twenty

[1] *People* v. *Pennington*, 267 Ill. 45; *People* v. *Siracusa*, 275 Ill. 457; *People* v. *Harney*, 276 Ill. 236; *People* v. *Throop*, 359 Ill. 354; *People* v. *De Rosa*, 362 Ill. 161; *People* v. *Williams*, 383 Ill. 348, cert. den. 321 U. S. 762; *People* v. *Fuhs*, 390 Ill. 67; *People* v. *Farris*, 392 Ill. 267; *People* v. *Corrie*, 387 Ill. 587.

years ago the Illinois Supreme Court explicitly announced that neither the State constitutional authorization for an accused to appear and defend by counsel nor the statute authorizing assignment of counsel in a non-capital case places upon the trial court "the duty to proffer the services of counsel" (*People* v. *Lavendowski*, 326 Ill. 173, 176). Since that decision, repeatedly and without qualification, it has delineated the scope of the judge's duty—whether to assign counsel [1] or to advise the accused of his right to assignment [2]—in similar terms. If anything can be said to be clear about the Illinois law in this field, it is that neither statute [3] nor Constitution obligates the judge to advise the accused of his right to assignment of counsel. Only where the accused makes an appropriate [4] request to obtain his rights, is it the judge's duty to grant them.

---

[1] *People* v. *Parcora*, 358 Ill. 448; *People* v. *Childers*, 386 Ill. 312; *People* v. *Corbett*, 387 Ill. 41; *People* v. *Fuhs*, 390 Ill. 67; *People* v. *Stack*, 391 Ill. 15, cert. den. 326 U. S. 792; *People* v. *Batey*, 392 Ill. 390; *People* v. *Russell*, 394 Ill. 192; *People* v. *Creviston*, 396 Ill. 78; *People* v. *Carter*, 398 Ill. 336; *People* v. *Easter*, 398 Ill. 430; compare *People ex rel. Ross* v. *Ragen*, 391 Ill. 419, cert. den. 327 U. S. 801; see also *Pippin* v. *People*, 398 Ill. 128 (which arose on coram nobis).

Similar rulings have been made with respect to the court's duty to hear evidence in mitigation or aggravation, although that duty is contained in the same section of the statute prescribing the duty to admonish as to the consequences of a plea of guilty (Ill. Rev. Stat. (1937), c. 38, § 732; *cf. People* v. *Pennington*, 267 Ill. 45; *People* v. *Crooks*, 326 Ill. 266; *People* v. *Gerke*, 332 Ill. 583; *People* v. *Throop*, 359 Ill. 354; *People* v. *Farris*, 392 Ill. 267).

[2] *People* v. *Corrie*, 387 Ill. 587; *People* v. *Evans*, 397 Ill. 430; *cf. People* v. *Van Horn*, 396 Ill. 496, and compare *People* v. *Lavendowski*, *supra* (which is cited in the instant case) with *People* v. *Kurant*, 331 Ill. 470.

[3] Compare recent efforts to amend Ill. Rev. Stat. (1937), c. 38, § 730, to compel the trial judge to advise defendants of their right to appointment of counsel (Senate Bill No. 349, 65th Gen. Ass.).

[4] See e.g. *People* v. *Van Horn*, 396 Ill. 496.

It is for this reason that in meeting claims of denial of counsel the Illinois Supreme Court invariably couches its opinion in terms of the scope of the judge's duty and finds or presumes that the trial court "discharged its duty to the defendant in all respects" (see e.g., *People* v. *Fuhs,* 390 Ill. 67, 68; *People* v. *Corbett,* 387 Ill. 41, 43) rather than that he advised, or is presumed to have advised, the accused of his right to assignment of counsel. Since the record shows no appropriate request by the accused, and the record "imports verity", the presumption is that no such request was made,[1] and the trial court therefore "did not deny a request for the services of counsel" (*People* v. *Parcora,* 358 Ill. 448, 451; cf. *People* v. *Gruhl,* 388 Ill. 52). Any doubt as to the meaning of the presumption was dispelled only recently in *People* v. *Van Horn,* 396 Ill. 496, 498, where the record showed the accused to have said he "wants * * * a lawyer", and the Supreme Court ruled that since the record did not show a request for assignment under oath "it will be presumed that the court discharged its duty to the defendant in all respects." See also *People* v. *Brown,* 397 Ill. 529, 531.

In short, in Illinois the scope of the duty is the measure of the presumption accorded by the Supreme Court. Where there is a duty to act affirmatively, its discharge is not presumed without some record notation. Where there is a duty to act only upon an appropriate request, its discharge is presumed because the record shows no appropriate request (*People* v. *Brown,* 397 Ill. 529, 531). Hence, as a matter of Illinois law where, as here, there is no notation of instruction as to the right to counsel, it is not presumed that the instruction was given.

The only notation in this record is that with respect to admonishing the accused as to the consequences of pleading guilty. This notation, the Illinois courts would

---

[1] *People* v. *Braner,* 389 Ill. 190, cert. den. 324 U. S. 875; *People* v. *Stubblefield,* 391 Ill. 609; *People* v. *Pond,* 390 Ill. 237, cert. den. 326 U. S. 749; *People* v. *Creviston,* 396 Ill. 78; *People* v. *Russell,* 394 Ill. 192; *People* v. *Corbett; People* v. *Corric; People* v. *Fuhs.*

presume to evidence the fullest and plainest explanation which the State law requires as to the implication of the plea.[1] But, although such an explanation appears to include advice as to the right to a jury trial (*Krolage* v. *People*, 224 Ill. 456, 458-459; *People* v. *Wilke*, 390 Ill. 598; cert. den. as untimely, 327 U. S. 779; and compare *People ex rel. Swanson* v. *Fisher*, 340 Ill. 250; *People* v. *Washington*, 397 Ill. 122), it has never been suggested that it includes advice as to the right to counsel. On the contrary, repeatedly, when the claim was made that advice as to the right to counsel had not been tendered, although the record necessarily recited that the accused had been admonished as to the consequences of the plea of guilty, the Illinois Supreme Court has either conceded that "so far as the record shows" there had been no such advice (*People* v. *Lavendowski*, 326 Ill. 173, 177) or ruled simply that there was no obligation to give such advice (see e.g. *People* v. *Evans; People* v. *Corrie;* cf. *People* v. *Van Horn, supra,* and compare *People* v. *Davis,* 396 Ill. 432, 434). Not once in those cases did it suggest that the admonition as to the consequences of pleading guilty, which it explicitly presumed to have been given fully and adequately (see e.g. *People* v. *Corrie, supra*) embodied any explanation as to the right to counsel. And the reason for this is plain—there is no duty in Illinois, statutory or otherwise, to advise an accused as to that right.

Accordingly, if Illinois law is to control the reading of this record, this Court is compelled to conclude that petitioner received no advice of any sort with respect to his right to assignment of counsel, or indeed his right to procure counsel of his own choice. In contrast to the question which would be presented if Illinois law commanded a trial judge to advise a defendant of his right to assignment of counsel and the Illinois courts "presumed" that he had done so (see e.g. *In re Application of Loundagin,*

[1] See e.g. *People* v. *Siracusa, People* v. *Harney, People* v. *Williams, People* v. *Fuhs, supra.*

129 Oregon 652; *State* v. *Scofield*, 129 Wash. 295; and compare *Haley* v. *Ohio*, No. 51, Oct. Term, 1947), here the only question is whether this Court will presume what the State law does not require, and the State courts carefully and calculatedly refrain from presuming.

FIFTH: Wholly apart from how, as a general matter, the law of Illinois might require this Court to interpret the record, the ruling of the Illinois Supreme Court in this case discloses that it did not either presume or find from the record presented to it that petitioner had received any advice as to his right to counsel or otherwise knew of it. In plain language it said: "* * * [In] the absence of a request, there was no duty upon the court to appoint counsel * * *. We have repeatedly held that the right to representation by counsel is personal to a defendant and may be waived or claimed as he himself elects, and that no duty rests upon the court to provide legal assistance for an accused unless he states upon oath his inability to procure counsel * * *. Nor is there any requirement, constitutional or statutory, that the court advise defendant of his rights under the statute. Furthermore, there is no requirement that the waiver of the statutory right to counsel appear on the face of the judgment order." On that assumption no finding that petitioner had been advised or knew of his right was necessary.

To be sure, the Court made no explicit finding that he had not been advised of his right. But that is simply to say that it did not spell out in black and white a finding which permeates every paragraph of its opinion, but which nothing in its authoritative conception of Illinois law required it to state explicitly (see *People* v. *Brown*, 397 Ill. 529, 531, citing the instant case).

Nor did that court find that petitioner otherwise knew of his right to counsel. It predicated its conclusion of waiver upon the assumption that the absence of a re-

quest for counsel was sufficient to establish waiver.[1] We have shown that under the decisions here that is an unduly narrow conception of the standards by which a competent surrender of constitutional right must be tested (compare also *Rice* v. *Olson, Tomkins* v. *Missouri, Powell* v. *Alabama, supra*). Applying an erroneous standard, the Supreme Court of Illinois did not find the facts which are required by the test here established. And there is nothing in Illinois law from which to presume such facts, if, indeed, such a presumption could foreclose inquiry here (compare *Haley* v. *Ohio*, No. 51, October Term, 1947). Hence, nothing in this record or in Illinois law leaves room for a finding here of the constitutionally significant facts which the Supreme Court of Illinois did not find (cf. *Ashcraft* v. *Tennessee*, 322 U. S. 143).

SIXTH: As we read the Illinois decisions, the explicit notation in the record of instructions as to an accused's "rights of Trial" neither independently imports advice as to his right to counsel nor signifies more than is contained in the admonition as to the consequences of pleading guilty. Accordingly, we submit that this Court, possibly in deference to the suggestion contained in the brief of the State (p. 14), gave a larger content to the record in *Foster* v. *Illinois* than the Illinois decisions justify. However, if we misread those decisions, we submit that this case stands upon a different footing than the *Foster* case. Even if the instruction as to an accused's "rights of Trial" could be found to import advice as to the right to assignment of counsel, no such instruction is noted in this record. And here, more plainly than in Foster's

[1] See e.g. *People* v. *Reynard*, 397 Ill. 244; *People* v. *Evans*, 397 Ill. 430; *People* v. *Corbett*; *People* v. *Corrie*; *People* v. *Braner*; *People* v. *Russell*; *People* v. *Stack*; *People* v. *Pond, supra*. Compare the more rigorous test of waiver prescribed by Illinois where the statutes are construed to impose upon the judge an affirmative duty to advise an accused of his rights. *People ex rel. Swanson* v. *Fisher*; *People* v. *Washington*; *People* v. *Corrie*.

case, the Illinois Supreme Court did not purport to find or presume any advice as to the right to counsel.

If the trial court did not inform petitioner of his right to assignment of counsel, and neither the record nor Illinois law contains anything from which it can possibly be inferred that petitioner knew of his right, manifestly his failure to enjoy the right cannot be due to his having made his choice "with eyes open". Only by "presuming" the conclusion can he be found, on this record, to have intelligently and understandingly surrendered his right. The Illinois Supreme Court did not presume an intelligent and understanding waiver. There is even less reason for this Court to do so (*Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 293, 307).

CONCLUSION

Due process of law under the Fourteenth Amendment entitled petitioner to the assignment of counsel to meet the accusation here levelled. He neither received nor waived the assistance to which he was thus entitled. His conviction was therefore obtained without due process of law. Petitioner respectfully submits that the judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

VICTOR BRUDNEY,
Attorney for Petitioner.

January, 1948.

APPENDIX

Constitution of the United States, Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Illinois (1870), Article Two, Section Nine:

In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witness face to face, and to have process to compel the attendance of witnesses in his behalf, and to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

Illinois Revised Statutes (1937), Chapter 38:

109. Crimes against children—Penalty.] § 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That any person of the age of seventeen years and upwards who shall take, or attempt to take, any immoral, improper or indecent liberties with any child of either sex, under the age of fifteen years, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, or who

shall commit, or attempt to commit, any lewd or lascivious act upon or with the body, or any part or member thereof, of such child, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, or any such person who shall take any such child, or shall entice, allure or persuade any such child, to any place whatever for the purpose either of taking any such immoral, improper or indecent liberties with such child, with said intent, or of committing any such lewd or lascivious act upon or with the body, or any part or member thereof, of such child with said intent, shall be imprisoned in the penitentiary not less than one year nor more than twenty years: Provided, that this Act shall not apply to offenses constituting the crime of sodomy or other infamous crimes against nature, incest, rape or seduction.

103. Delinquent child defined.] § 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That for the purposes of this Act a delinquent child is any male who while under the age of seventeen (17) years, or any female who while under the age of eighteen (18) years violates any law of this state; or is incorrigible, or knowingly associates with thieves, vicious or immoral persons; or without just cause and without the consent of its parents, guardian or custodian absents itself from its home or place of abode, or is growing up in idleness or crime; or knowingly frequents a house of ill repute; or knowingly frequents any policy shop or place where any gambling device is operated; or frequents any saloon or dram-shop where intoxicating liquors are sold; or patronizes or visits any public pool room or bucket shop; or wanders about the streets in the night time without being on any lawful business or lawful occupation; or habitually wanders about any railroad yards or tracks or jumps or attempts to jump onto any moving train; or enters any car or engine without lawful authority; or uses vile, obscene,

vulgar, profane or indecent language in any public place or about any school house; or is guilty of indecent or lascivious conduct.

104. Penalty.] § 2. Any person who shall knowingly or wilfully cause, aid or encourage any male under the age of seventeen (17) years or any female under the age of eighteen (18) years to be or to become a delinquent child as defined in section one (1), or who shall knowingly or wilfully do acts which directly tend to render any such child so delinquent and who, when able to do so, shall wilfully neglect to do that which will directly tend to prevent such state of delinquency shall be deemed guilty of the crime of contributing to the delinquency of children and on conviction thereof shall be punished by a fine of not more than two hundred (200) dollars, or by imprisonment in the county jail, house of correction or workhouse not more than one (1) year, or by both such fine and imprisonment.

590. Sound mind.] § 10. A person shall be considered of sound mind who is neither an idiot nor lunatic, nor affected with insanity, and who hath arrived at the age of fourteen years, or before that age if such person know the distinction between good and evil.

592. Insanity.] § 12. An insane person, without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged: Provided, the act so charged as criminal shall have been committed in the condition of insanity. If, upon the trial of a person charged with crime, it shall appear from the evidence that the act was committed as charged, but that, at the time of committing the same, the person so charged was insane, the jury shall so find by their verdict, and by their verdict shall further find whether such person has or has not entirely and permanently recovered from such insanity; and in

case the jury shall find such person has not entirely and permanently recovered from such insanity, the court shall commit such person to the Department of Public Welfare. But in case the jury shall find by their verdict that such person has entirely and permanently recovered from such insanity, he shall be discharged from custody. If after commitment such person in a subsequent hearing before a jury shall be determined by verdict to have entirely and permanently recovered from such insanity, he shall likewise be discharged from custody.

If a person be charged by indictment with the commission of a felony, and if before trial the judge before whom said cause is pending shall, in accordance with the law, impanel a jury to ascertain before a plea whether or not said person is insane or feebleminded, and if said jury so impaneled shall by their verdict determine that said person was at the time of the impaneling of said jury either insane or feebleminded, then the court shall commit such person to the Department of Public Welfare. If on such hearing before trial, or upon any hearing subsequent to commitment, the jury shall determine that a defendant is not insane or feebleminded, or has permanently recovered from such insanity or feeblemindedness, then such person shall be subject to trial for the offense with which he is charged by indictment. . . .

593. Becoming insane.] § 13. A person that becomes lunatic or insane after the commission of a crime or misdemeanor shall not be tried for the offense during the continuance of the lunacy or insanity. If, after the verdict of guilty, and before judgment pronounced, such person become lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue. And if, after judgment and before execution of the sentence, such person become lunatic or insane, then in case the punishment be capital, the execution thereof shall be stayed until the recovery of said person from the insanity or lunacy. In all

of these cases, it shall be the duty of the court to impanel a jury to try the question whether the accused be at the time of impaneling, insane or lunatic.

730. Counsel—Fees for indigent defendant.] § 2. Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense. In all cases counsel shall have access to persons confined, and shall have the right to see and consult such persons in private.

Whenever it shall appear to the court that a defendant or defendants indicted in a capital case, is or are indigent and unable to pay counsel for his or her defense, it shall be the duty of the court to appoint one or more competent counsel for said defendant or defendants. • • •

732. Plea of guilty explained.] § 4. In cases where the party pleads "guilty," such plea shall not be entered until the court shall have fully explained to the accused the consequences of entering such plea; after which, if the party persist in pleading "guilty," such plea shall be received and recorded, and the court shall proceed to render judgment and execution thereon, as if he had been found guilty by a jury. In all cases where the court possesses any discretion as to the extent of the punishment, it shall be the duty of the court to examine witnesses as to the aggravation and mitigation of the offense.